Course
Global Environmental Litigation
2020

Chapter 3
Procedure-Related Issues

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Table of content

CH. 3: PROCEDURE-RELATED ISSUES

This chapter shall focus on procedure-related issues, which have a major impact on the definition of a litigation strategy. The main relevant points concern 1) Interim measures; 2) Rules on the taking of evidence; 3) Publicity of the proceedings and public participation; 4) Costs.

3.1. Interim measures

In transnational proceedings, deciding where to seek interim measures is a strategic issue. The basic rule is that the court having jurisdiction on the merits also has jurisdiction to order interim measures. However, other courts may also have (limited) jurisdiction to order interim measures.

Domestic courts having jurisdiction on the merits

- **Jurisdiction**

Is the court having jurisdiction on the merits also competent to order interim relief: Comparative law on the jurisdiction of courts.

- **Law applicable**

What is the law applicable to the interim measure? Distinction to be made between the content of the measure and the power of the judge.

- **Geographical reach of the measure**

If all or part of the measure's effects are expected in one or several other countries, will the order of the court be enforced in such other countries? If not, duplication of the proceedings in other countries might be needed, nonetheless.

Other domestic courts

- **Jurisdiction**

Is a court, different from the one seized on the merits, ready to exercise jurisdiction to order interim measures? Comparative law on jurisdiction of the courts over interim measures.

- **Law applicable**

Is such a court applying its own law? If so, does such a law provide measures that could not be obtained elsewhere?

- **Geographical reach of the measure**

Is the effect of the interim measure expected on the territory of this other State? If not, what is the territorial reach of the measure outside of its country of origin?

See the case-study in *Chevron v. Ecuador* to illustrate the issue.

International courts and arbitration tribunal

Do they have the power to order interim measures in relation with cases they are dealing with?

3.2. Evidence

Issues related to the taking of evidence are usually at the core of the definition of a litigation strategy. Depending on the availability of poofs, parties might favor one way or another, one forum or another.

Applicable law and power of the courts

Decision to choose a forum should be taken based on a careful assessment of the laws in presence, the rule being that each forum shall apply mainly its own domestic law, eventually combined with the law applicable on the merits.

The rule on the applicable law (conflict-of-laws) depends on the issue at stake: subject of proof, forms of proof, burden of proof, standard of proof. The availability of *discovery* is often seen as a competitive advantage; however this might be questioned.

Alternative fora

On the issue of proof, it is particularly relevant to consider possible other fora. For instance, the OECD National Contact Point procedure, even if it may be questioned in terms of effectiveness of the outcome, shows great interest in terms of proof, since the NCP might personally engage in the gathering of proof.

Impact of Human rights

National laws on the taking of evidence may be subjected to international constraints, mainly derived from regional Human rights systems: Evidence is a key element of a fair trial (see ECtHR: Handolsdalen v. Sweden).

3.3. Publicity and participation

Whereas international and State courts proceedings are traditionally covered by the principle of publicity, ADR proceedings tend to protect the confidentiality of the debates. Growing concern is shown for transparency and public participation in proceedings having an impact on the public interest, which is the case for environmental and human rights litigation. Investment arbitration has been the driver of an evolution which should now be questioned everywhere. The status of amicus curiae should be analyzed in the various procedures.

Transparency in ADR

From Investment arbitration (see for instance the case study on *Chevron v. Ecuador*, or the ICSID case *Bear Creek Mining v. Peru*, ARB/14/21) to mediation (see the case study on Survival v. WWF, with the assumed breach of confidentiality by Survival as a strategic weapon).

Amicus curiae

Analyze the availability ofof amicus curiae

3.4. Costs

The issue of costs is a crucial one and it should not be underestimated when defining a litigation strategy: Where to bring a claim also depends on whether the availability of justice is subjected to financial conditions, and on the risks incurred in terms of financial burden if you lose your case.

See ECtHR, Handolsdalen Sami Village v. Sweden, as a relevant illustration. The case highlights two different issues regarding costs.

Costs as a pre-condition for proceedings

The first one appears at the very beginning of the procedure, *before the case is tried, when costs are incurred by the parties as a condition to participate in proceedings*: assignment of a sum of money *(cautio judicatum solvi*); fees paid to appoint a lawyer where representation is mandatory (legal aid).

Costs as a consequence of the proceedings

The second issue occurs *after* the case is tried, depending on how costs are allocated between the parties. The question is relevant since the risk of supporting excessive fees could deter some parties to access justice -and for the respondent it is even worse since he is not the one taking the initiative of the claim.